No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1960

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Because respondents' brief (which contains very few record references) makes several inaccurate or incomplete factual statements, this reply brief is filed to correct those assertions on which respondents appear to rely most heavily.

The unsoundness of respondents' factual claims is particularly evident from the comparative table on pages 24–25 of their brief, which makes unqualified assertions contradicted or unsubstantiated by the record, or seen in a very different light when all relevant evidence is considered. For example:

1. In Item 2 (p. 24) respondents state that, while previously the profits were retained by Mrs. Whit-

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aker, under the Cooperative "all proceeds after costs go to members." The record shows that the homeworker-members have received nothing other than the fixed piece rates for their work (R. 12–13, 125–126), and that the Cooperative since its inception has operated at a loss with a large indebtedness to Mrs. Whitaker for the transfer of her inventory to the Cooperative, as well as for her "salary" as manager (R. 193–195). Also, the by-laws of the Cooperative explicitly provide (Article 4, § 1) that "[t]he excess receipts of the Cooperative shall not be used to pay dividends to members on their membership interests" (R. 152), and that only after payment of expenses, establishment of "depreciation reserves," and of "a capital reserve," any balance "may, in the discretion of the Board of Directors, be used for patronage refunds which will be distributed according to the percentage of work submitted to the Cooperative for sale" (Article 11, § 2, R. 160). Even if this dubious provision could be construed as entitling the members to any "profits," the evidence shows it to be wholly illusory. As the Cooperative's accountant testified, the overhead, operating costs and current indebtedness are such that there is no likelihood that the Cooperative can become solvent in the foreseeable future (R. 208), much less that there will be any "profits" for distribution to homeworker-members.

2. In Item 3 (p. 24) respondents state that, while the sales were personally performed by Mrs. Whitaker, the sales under the Cooperative are handled by a "sales force hired by directors." The record shows

that this "sales force" is Mrs. Law, whose similar Tennessee homeworker operations had been enjoined (see petitioner's main brief, pp. 5, 11), and to whom, for several years immediately prior to the organization of the Cooperative, Mrs. Whitaker had regularly supplied substantial quantities of the articles produced by her Maine homeworkers—*i.e.*, Mrs. Law had, in substance, previously been serving as a sales agent for Mrs. Whitaker personally (R. 62–63).[1]

3. In Item 5 (p. 24) respondents state flatly that the risk of loss was entirely on Mrs. Whitaker previously, while under the Cooperative the risk of loss is entirely with the members. However, the by-laws explicitly provide (Article 4, § 2) that "[n]o member shall be liable for any debts or obligations of the Cooperative; nor shall any member be liable for any assessment" (R. 152). There is no evidence in the record that the homeworker-members assumed the risks of loss of the business. Apparently, respondents' statement rests solely on counsel's outside-of-the record assertion (see respondents' brief, p. 7, fn. 1) that subsequent to the trial "the home office of the cooperative" (*i.e.*, Mrs. Whitaker's home) was burned, resulting in a $6,000 loss over and above the

[1] The undisputed evidence also shows that Mrs. Law, at the time of the organization of the Cooperative, had on hand "several hundred dollars" worth of merchandise furnished her by Mrs. Whitaker just prior to the formation of the Cooperative, and that Mrs. Whitaker "personally" (not the Cooperative) subsequently received payment for this merchandise from Mrs. Law (R. 63, 75). It appears that Mrs. Law and Mrs. Whitaker joined forces in the operation of the Cooperative (see petitioner's main brief, pp. 12–13, 53–54).

insurance on the inventory, and that this loss was borne, not by Mrs. Whitaker or the Cooperative, but by the homeworker-members "in proportion to [each member's] share of ownership in the entire inventory." Even if this extrinsic information should prove to be true or were a matter of record, the imposition of this loss on the homeworker-members (which obviously means that this loss was deducted from the already substandard meager piece-rates due them) serves only to highlight, we submit, the fact that the Cooperative is operated to protect Mrs. Whitaker's interests.[2] In this connection, it may be noted, also, that there is nothing in the record to to support respondents' statement (on page 17 of their brief) that "the members do not transfer title to the Cooperative when they send in their items to be sold." Respondents' brief itself later (p. 24) describes the inventory as a "fungible mass owned by all the members," and everything in the record points to the conclusion that title was transferred to the Cooperative. Thus, the Cooperative's financial statements list the "Merchandise inventory" under its "Assets" (R. 194), and the Cooperative offered the inventory as collateral security when seeking a bank loan to the Cooperative (R. 175).

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[2] Respondents' statement that the imposition of this loss "was done as a result of their own [the individual members'] voting" raises questions as to how this voting was carried out. Was it, like all the other voting of members, at a meeting without a quorum present? (See petitioner's main brief, pp. 9, 56). Were respondents Bird and Whitaker present at the meeting where this "voting" took place and did either of them suggest the "problem" which prompted the "voting"? (Cf. petitioner's main brief, pp. 51–52).

4. In Item 8 (p. 24) respondents state that Mrs. Whitaker previously made payments to homeworkers "promptly after she received goods," while the "amount of payments [are] determined by directors after goods are sold" under the Cooperative (see also statement on p. 17 of respondents' brief that "the Cooperative is not liable to the members for any set purchase price"). However, respondents' own witness testified unqualifiedly that there were definite fixed prices under the Cooperative and that the homeworkers expected to get those prices (R. 129–130, see also schedule of rates, R. 12–13), and that there was not very much difference in the time when payments were made—that there were times when payments were slow before the Cooperative was organized "when they built up an inventory or customers were hard to get or * * * slow in paying," just as occurred under the Cooperative (R. 131). The record also shows that at the board of directors' meeting on August 22, 1957, a motion was passed that all goods submitted before the 10th of the month would be paid for on or before the 20th of that month, and that any received after the 10th would be paid for by the 20th of the following month (R. 170–171). At the stockholders' meeting almost a year later, on June 26, 1958, a recommendation by the Cooperative's accountant (Francis W. Jacob) to withhold 40% of the amount due members for a few months so as to build up a cash reserve was tabled and, instead, a motion that "payments be sent to members on a set date at fixed periods * * * every two months" was passed (R. 181–182).

5. In Item 15 (p. 24) respondents assert that, after the organization of the Cooperative, money was borrowed in the name of the Cooperative. The only loan to the Cooperative shown in the record was the $5000.00 loan, the note for which, although made by the Cooperative, was also personally endorsed by Mrs. Whitaker's relative, Kennedy (R. 83, 85), who was not a qualified member of the Cooperative and whose interest in the Cooperative was patently on Mrs. Whitaker's behalf (see petitioner's main brief, pp. 50–51).[3]

Respectfully submitted.

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[3] An insignificant error in respondents' brief appears in Item 1 of the comparative table on page 25. The correct figures are 26 of the 28 incorporators—not 34 of the 36 (R. 164, 201).

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[April 24, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent is a cooperative organized in 1957 under the laws of Maine; and we assume it was legally organized. The question is whether it is an "employer" and its members are "employees" within the meaning of the Fair Labor Standards Act of 1938, § 3, 52 Stat. 1060, as amended, 29 U. S. C. § 203. The question is raised by a suit filed under § 17 of the Act by petitioner to enjoin respondent from violating the provisions of the Act concerning minimum wages (§ 6), record-keeping (§ 11 (c)) and the regulation of industrial homework (§ 11 (d)). And see § 15 (a)(5). The District Court denied relief. 170 F. Supp. 743. The Court of Appeals affirmed by a divided vote. 275 F. 2d 362. The case is here on a petition for certiorari which we granted (364 U. S. 861) because of the importance of the problem in the administration of the Act.

The corporate purpose of the respondent as stated in its articles is to manufacture, sell, and deal in "knitted, crocheted, and embroidered goods of all kinds." It has a general manager and a few employees who engage in finishing work, *i. e.*, trimming and packaging. There are some 200 members who work in their homes. A homeworker who desires to become a member buys from

respondent a sample of the work she is supposed to do, copies the sample, and submits it to respondent. If the work is found to be satisfactory, the applicant can become a member by paying $3 and agreeing to the provisions of the articles and bylaws. Members were prohibited from furnishing others with articles of the kind dealt in by respondent.[1] They are required to remain members at least a year. They may, however, be expelled at any time by the board of directors if they violate any rules or regulations or if their work is substandard.[2] Members are not liable for respondent's debts; they may not be assessed; each has one vote; their certificates are not transferrable; each member can own only one membership; no dividends or interests are payable on the certificate "except in the manner and limited amount" provided in the bylaws. The bylaws provide that "excess receipts" are to be applied (1) to writing off "preliminary expenses"; (2) to "necessary depreciation reserves"; (3) to the establishment of a "capital reserve." The balance may be used in the discretion of the board of directors "for patronage refunds which shall be distributed according to the percentage of work submitted to the Cooperative for sale." Members are paid every month or every other month for work submitted for sale on a rate-per-dozen basis. This payment is considered to be "an advance allowance" until there is a distribution of "excess receipts" to the members "on the basis of the amount of goods which each member has submitted to [respondent] for sale."

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[1] This provision of the bylaws was purportedly removed by a vote at the annual meeting of June 26, 1958, though a quorum was not present at the meeting. See *Mitchell* v. *Whitaker House Cooperative, Inc.*, 170 F. Supp., at 749, nn. 7, 8, 751.

[2] An expulsion may be appealed by filing a petition "to be acted upon by the members at the next meeting." Cf. Me. Rev. Stat., c. 56, § 16.

By § 11 (d) of the Act the Administrator is authorized to make "such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Section 11 (d) was added in 1949 [3] and provides that "all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect."

These Regulations [4] provide that no industrial homework, such as respondent's members do, shall be done "in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate" [5] has been issued. Respondent's members have no such certificates; and the question for us is whether its operations are lawful without them and without compliance by respondent with the other provisions of the Act.

These Regulations have a long history. In 1939, shortly after the Act was passed, bills were introduced in the House to permit homeworkers to be employed at rates lower than the statutory minimum.[6] These amendments were rejected.[7] Thereupon the Administrator issued regulations governing homeworkers; [8] and we sustained some of them in *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, decided in 1945. In 1949 the House adopted an amendment which would have exempted from the Act a large group

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[3] Fair Labor Standards Amendments of 1949, § 9, 63 Stat. 910, 916.

[4] See 29 CFR §§ 530.1–530.12.

[5] *Id.*, § 530.2.

[6] See H. R. Rep. No. 522, 76th Cong., 1st Sess., p. 10; 86th Cong. Rec. 4924, 5122.

[7] 86 Cong. Rec. 5499; see also the remarks of Mr. Zimmerman, *id.*, at 5136, and of Mr. Hook, *id.*, at 5224–5225.

[8] The Knitted Outerwear Wage Order, which covers the industry in which respondent is engaged, was issued April 4, 1942. See 7 Fed. Reg. 2592.

of homeworkers.[9] The Senate bill contained no such exemption; and the Conference Report rejected the exemption.[10] Instead, § 11 (d) was added, strengthening the authority of the Administrator to restrict or prohibit homework.[11] Still later respondent was organized; and, as we have said, it made no attempt to comply with these homework regulations.

We think we would be remiss, in light of this history, if we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations. By § 3 (d) of the Act an "employer" is any person acting "in the interest of an employer in relation to an employee." By § 3 (e) an "employee" is one "employed" by an employer. By § 3 (g) the term employ "includes to suffer or permit to work." We conclude that the members of this cooperative are employees within the meaning of the Act.

There is no reason in logic why these members may not be employees. There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. For the corporation would "suffer or permit" them to work whether or not they owned one share of stock or none or many. We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both "members" and "employees." It is the cooperative that is affording them "the opportunity to work, and paying them for it," to use the words of Judge Aldrich, dissenting below. 275 F. 2d, at 366. However immediate or remote their right

[9] 95 Cong. Rec. 11209–11210.

[10] H. R. Rep. No. 1453, 81st Cong., 1st Sess.

[11] 95 Cong. Rec. 14927.

to "excess receipts" may be,[12] they work in the same way as they would if they had an individual proprietor as their employer.[13] The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.[14] Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management in other words can hire or fire the homeworkers. Apart from the other considerations we have mentioned, these powers make the device of the cooperative too transparent to survive the statutory definition of "employ" and the Regulations governing homework. In short, if the "economic reality" rather than "technical concepts" is to be the test of employment (*United States* v. *Silk*, 331 U. S. 704, 713; *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, 729); these homeworkers are employees.

Reversed.

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[12] There has been no distribution of "excess receipts" to the members. The evidence is that respondent could survive "as a financially solvent enterprise only by doubling its present gross income." As of the date of the trial, respondent was in arrears even as respects what it owed its managerial employees. See 170 F. Supp., at 751.

[13] See *Mitchell* v. *Law*, 161 F. Supp. 795.

[14] When the cooperative desired to reduce its inventory and the rate of production of its members, it withheld the "advance allowances."

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Mr. Justice Whittaker, with whom Mr. Justice Brennan and Mr. Justice Stewart join, dissenting.

It is clear and undisputed that the Fair Labor Standards Act does not apply in the absence of an employer-employee relationship. Here, upon what seems to me to be ample evidence, the District Court found that the cooperative was created and is being operated as a true cooperative under the laws of Maine, 170 F. Supp. 743, and, on appeal, the Court of Appeals approved those findings. 275 F. 2d 362. Unless those findings are clearly erroneous, they must be accepted here. Fed. Rules Civ. Proc., 52 (a), 28 U. S. C. Accepting them excludes any notion that the cooperative was formed or availed of as a "device" to circumvent the Act. It is not seriously contended here that these findings of the two courts below were "clearly erroneous," but rather the Government's principal contention is that the bona fides of the cooperative are immaterial.

Doubtless, even a true cooperative may have employees. But surely a true cooperative does not automatically become the "employer" of its "members" in the commonly understood sense of those terms, nor, hence, in their sense as used in subparagraphs (d) and (e) of § 3 of the Act, 29 U. S. C. § 206 (d) and (e). Something more is required. For the Act to apply, the cooperative must in a fair sense

"employ" its "members." Like the two courts below, I think it may not fairly be said, on this record, that there is any evidence that the cooperative ever did "employ" its "members," or suffer or permit them to work *for it*. Instead, the evidence shows, as the two courts below found and as I read it, that each member worked for herself—in her own home when and as she chose—toward the production of knitted articles which she marketed through her cooperative, receiving immediately "an advance" thereon, and ultimately—after payment of her portion of the cooperative's "expenses" and setting up its "necessary depreciation [and capital] reserves"—the balance of the proceeds of sale would "be distributed [to her] according to the percentage of work [she] submitted to the cooperative for sale." Like the two courts below, I fail to see in this any element of employment by the cooperative of its members.

If, as seems practically inevitable in the light of the Court's judgment, the cooperative must now be dissolved, will not its assets, including its "depreciation [and capital] reserves" as well as its "excess receipts," have to be refunded to its members "according to the percentage of work submitted [by them respectively] to the cooperative for sale," and not according to their memberships or investments, just as required by the Maine statute and the cooperative's articles? This seems wholly inconsistent with any notion that the members were employees of the cooperative or that they were suffered to work *for it*, or that it bought or paid them for their knitted articles.

On the basis of the amply supported findings of the two courts below, it seems reasonably clear that the cooperative never did "employ" its "members," and inasmuch as the Act does not apply in the absence of an employment relationship, I think the judgment of the two courts below is consonant with the facts and the law and should be affirmed.